



## GUEST ESSAYS

### "SOVEREIGN SUCCOTASH"

#### Public Client May Be Immune From Suit - Are You?

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Even when private work is slow, public clients can provide steady, visible projects. The legal stature of a public entity is different than that of a private client, giving the public entity a shield from some liabilities. In addition, the intended users of a public project provide a broad array of potential plaintiffs who may be faced with the inability to hold their government liable for whatever went wrong. The American litigation climate being what it is, one has to consider the effect of being the only solvent or insured target when something bad happens. Public work can be plentiful and profitable in otherwise tight economic times, but that work presents unusual risks that must be considered before entering the public arena.

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*Two lawyers go hiking in the woods and are surprised by the thundering roar of a large bear. One lawyer freezes, terrified. The other lawyer reaches into his backpack and pulls out a pair of running shoes. "What are you doing? You can't outrun a bear!" Lacing up his shoes, the other lawyer smiles and says "I don't have to outrun the bear. I just have to outrun you."*

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**It's Good To Be The King.** In Common Law England, there could be no claim against the King because the King's origin was divine -- he could do no wrong. As a practical matter, the King was the sovereign, responsible for making the laws and controlling the currency. You couldn't sue the King because he said so. This became known as sovereign immunity.

American law is based largely on English Common Law and carried the concept of sovereign immunity into the Constitution and the constitutions of most American states. Governments, though, became employers, owners of real estate, operators of hospitals, banks, schools, colleges and agencies, all in addition to being law and policy making bodies. The costs of a government's operations are borne by the citizens through payment of taxes by the entire citizenry. But for the one poor homeowner whose house is ravaged by an unfortunately placed and even more unfortunately designed storm sewer, spreading the pain to the entire citizenry makes more sense than individually paying for public wrongs.

**Tort Immunity.** As the role of American government evolved, so did sovereign immunity. The concept of a sovereign that could do no wrong became an anachronism. By the mid 1900's, the federal and state governments themselves provided a waiver of sovereign immunity for certain claims, legislated in the Federal Tort Claims Act (FTCA) and similar state statutes. The FTCA, for example, waives the federal government's sovereign immunity when government employees are negligent in the scope of their job

duties "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. S 1346(b).

Remember that our civil law is roughly divided between relationships arising out of contract and those arising outside of contracts (torts). Our governments are typically liable for duties undertaken by contract. They must pay for the services and materials they order and are liable for breach of contracts they sign.

Tort claims arise independently of any contract (a slip and fall, a punch in the nose, a car accident). By virtue of the FTCA and similar state statutes, tort immunity was intentionally waived for claims arising out of day to day operations, so called "ministerial" acts. Immunity was not waived for more traditional governmental functions, passing laws or establishing policy. The determination of whether an action is discretionary and immune versus ministerial and not immune, however, generates a great deal of litigation by itself. Even after the FTCA, the government remains immune from tort claims for actions that are uniquely governmental or use a government's discretion, like policy making or legislating. Wherever there is room for policy judgment or decision, with a few exceptions, the government still cannot be sued for torts.

**The Better Part of Valor.** There are obvious examples of a government's discretionary authority. The decision to pass or reject a law banning handguns must be freely debated and voted to conform to the wishes of a city's constituents. There are Constitutional and policy reasons for or against such a law. Rejecting the handgun law does not subject the city to liability for all handgun fatalities. But such a decision is left to government because it is a uniquely governmental function. A private citizen cannot be left to decide that all handguns are bad and to begin seizing all guns or arresting private citizens by force.

**Designs On You.** In the construction context, a city can pass an ordinance providing for storm water management and then poorly design the system, resulting in localized flooding. The decision to provide for storm water management is certainly discretionary and therefore immune from suit. But who pays for the flood damage to the city's residents arising out of the system's design? Is the design a discretionary function?

The answer to that question differs by state. Some states call those decisions discretionary and protect the city. Others draw a line between the decision to pass the ordinance (discretionary) and the task of designing the storm water management system (ministerial), forcing the city to pay for bad design. In jurisdictions where the city's engineers designed the storm sewers, there may be an impact on local taxes or the city's own insurance.

But what happens when the city hires outside engineers to do the same design work? A city's outside engineers usually do not have the same protection as their public clients. The result is like the above example of the two lawyers and the bear. The city may get the running shoes, leaving the engineer behind to contend with the bear. The engineer becomes the deep pocket for claims arising out of the project.

**An Officer And A Gentleman.** Many design professionals serve municipal clients as an outside city engineer, reviewing plans and making recommendations to local plan commissions and zoning boards on the issuance of building permits. When performed by city-employed engineers, those tasks are uniquely governmental and typically immune from suit. But when the same tasks are performed by ordinary citizens like outside engineers, the engineers have liability where their client may not.

The tort claims statutes in many states protect public employees as well as their agents and officers. When acting as the official "village engineer," you may actually be included in the definition of a public employee and therefore have immunity. Your lawyers can file motions to dismiss claims arising out of that public work, but those motions are hard fought. We have had many of our clients' motions defeated because there was some technical flaw in whether the village engineer was properly appointed, sworn in, badged, oathed, bonded and stayed within the bounds of their duties. If the village bylaws and ordinances were not followed to the letter, the engineer cannot usually get out of the lawsuit. If the same village engineer provides permit review services and their engineering firm also provides design services to the village on an hourly basis, the village engineer is more likely to be deemed an independent contractor than an immune "employee, agent or officer."

Public projects also enjoy a unique set of end users - the general public. The design of a private office building assumes a business clientele and their respective customers. The design of a public park or a courthouse must envision use by literally anyone; children, vandals, the weak, the infirm and the clumsy. If you are designing a skate park or a sled hill, you know in advance that there will be injuries and that your client may be immune from suit. If your fee is \$100,000 and your deductible is \$50,000 per claim, how badly do you want the work? What can you do to mitigate the obvious risks?

A few suggestions.

**Sweat The Details.** Know and understand whether public clients and officers are subject to tort liability in the state where the project is located. If you are acting as a "village engineer" or similar capacity, insist that the public body follow all of the formality required by the bylaws or ordinances. Just because Ralph has always been the Village Engineer, he is not excused from requirements like an annual ordinance reappointing him, a bond posted as required, a public swearing in or other formalities.

**Project Insurance.** Project insurance is increasingly used for public construction and can help both you and your public client. For your client, a project policy provides dedicated insurance limits that can't be eroded by claims on other projects. For you, your practice policy should not be charged with the fees received on the project covered by project insurance (remember that fees are one of the largest factors of your premium).

**Contract Language.** Many of our clients provide detailed descriptions of the services they include, but fail to address or be as detailed about the services that they exclude. Tort liability arises out of the scope of services provided or that can be implied. Don't leave it to the judge or jury to imply what you might have included. Particularly with public parks, skate parks and pools, make certain to deal with the Owner's obligation to provide for the facility's operations and safety, and that you will not be providing such services.

**Value Engineering.** Any time that a public body reduces quality or scope to reduce cost, carefully note that fact in meeting minutes. Invariably, we see claims in which the accident might have been prevented by the very item deleted during so-called value engineering. If you advise against a reduction in scope or quality, make sure to say so in writing. Documents prepared at the time of the design decision are much more persuasive to a jury than foggy recollections years later.

**The Empty Chair.** Judges and juries are human beings that recognize the practical realities of a lawsuit. With many defendants, all else being equal, you stand a better chance of obtaining summary judgment or settling reasonably than if there are few defendants (or only one). You may have heard the term "empty



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chair" defense, which refers to blaming an absent party for the claim. Even though the public body is immune, it can still be blamed as part of your defense. In that instance, though, you are just like the lawyer without running shoes standing before the growling bear, mumbling something that sounds like "succotash."

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*NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.*